FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-539

DAYTON BOARD OF EDUCATION, *et al.*,

Petitioners,

—v.—

MARK BRINKMAN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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88

TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of Amicus 1

SUMMARY OF ARGUMENT 3

ARGUMENT

I. SINCE THE DAYTON SCHOOL BOARD WAS FOUND TO HAVE PRACTICED INTENTIONAL SEGREGATION WITH RESPECT TO A MEANINGFUL PORTION OF THE SCHOOL SYSTEM, AND DID NOT REBUT THE PRESUMPTION THAT THE ONE-RACE CHARACTER OF 47 OUT OF ITS 68 SCHOOLS WAS LIKEWISE THE RESULT OF INTENTIONALLY SEGREGATIVE ACTIONS, THE INTENT TO SEGREGATE IS DEEMED TO EXIST SYSTEM-WIDE, AND SYSTEM-WIDE RELIEF IS MANDATED. 5

II. THE DESEGREGATION PLAN ADOPTED BY THE DISTRICT COURT AND APPROVED BY THE SIXTH CIRCUIT IS FULLY CONSISTENT WITH, AND IN THE CIRCUMSTANCES OF THIS CASE MANDATED BY, THE APPLICABLE DECISIONS OF THIS COURT. 14

CONCLUSION 17

Table of Authorities

Casteneda v. Partida, ___ U.S. ___, 45 U.S.L.W. 4302 (March 23, 1977).... 8

Cooper v. Aaron, 358 U.S. 1 (1958).... 16

Davis v. School Commissioners of Mobile County, 402 U.S. 33 (1971)..... 3, 8, 14

Green v. County School Board of New Kent County, 391 U.S. 430 (1968) 15

Keyes v. School District No. 1, Denver, 521 F.2d 465 (10th Cir. 1975), cert. denied, 423 U.S. 1066 (1976) 16

Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973)..... 2, 3, 7, 8, 10, 11, 12, 13

Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) 4, 16-17

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 9, 14, 15

United States v. Scotland Neck Board of Education, 407 U.S. 484 (1972) 4, 16

Village of Arlington Heights v. Metropolitan Development Corp., ___ U.S. ___, 45 U.S.L.W. 4073 (Jan. 11, 1977) 8

Washington v. Davis, 426 U.S. 229 (1976) 7, 8

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus*

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated solely

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* Letters of consent to the filing of this brief from counsel to the parties will be lodged with the Clerk of the Court.

to defending the guarantees of the Bill of Rights. Central among those guarantees is the right of all persons to equal treatment under the law. No component of that right is more precious than the opportunity of black children to receive an education in school systems that are not intentionally segregated. Because of our concern with such issues, the ACLU has represented plaintiffs in school desegregation litigation throughout the country, seeking to make the promise of racial equality in education a reality across the nation.

The arguments raised by the school board in this case, if accepted, would severely undermine those efforts and would effectively limit the requirements established by this Court in Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973). We are filing this brief in order to suggest why the Court should reject those arguments, and should re-affirm the principles set forth in Keyes.

SUMMARY OF ARGUMENT

I.

The courts below properly held that the plaintiffs had made out a case of de jure segregation within the Dayton school system, entitling them to system-wide relief. Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973). Once a proper finding of intent to segregate was made, the burden shifted to the school authorities to show that those schools which were racially identifiable did not have that character as a result of intentionally segregative actions, and the school authorities did not satisfy that burden. Instead, the school authorities are seeking, in effect, to have this Court overrule Keyes and hold that in a district where segregation is not required by state law, the intent to segregate test of de jure segregation no longer applies. That argument should be rejected, and the principles of Keyes re-affirmed.

II.

The remedial plan adopted and approved below is a sound one, does not involve "racial balance," and insures the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Davis v. School Commissioners of Mobile County,

402 U.S. 33, 37 (1971). Fears of future "resegregation" or "white flight" cannot undermine the present obligation of the school authorities to achieve desegregation of the Dayton schools. United States v. Scotland Neck Board of Education, 407 U.S. 484 (1971); Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).

A R G U M E N T

I

SINCE THE DAYTON SCHOOL BOARD WAS FOUND TO HAVE PRACTICED INTENTIONAL SEGREGATION WITH RESPECT TO A MEANINGFUL PORTION OF THE SCHOOL SYSTEM, AND DID NOT REBUT THE PRESUMPTION THAT THE ONE-RACE CHARACTER OF 47 OUT OF ITS 68 SCHOOLS WAS LIKEWISE THE RESULT OF INTENTIONALLY SEGREGATIVE ACTIONS, THE INTENT TO SEGREGATE IS DEEMED TO EXIST SYSTEM-WIDE, AND SYSTEM-WIDE RELIEF IS MANDATED.

The Dayton School Board argues that since the District Court's finding of intent to segregate was premised only on the discriminatory establishment of optional attendance zones, the District Court could only require the remedying of the segregation that was shown to have resulted from this action and could not order system-wide desegregation. (Brief for Petitioner, pp. 25-30). The District Court also found, however, that the school board was operating an inordinate number (47 out of 68) of "racially imbalanced," or more accurately, racially identifiable schools, and premised its finding of the existence of de jure segregation on both

of these factors. 1/ In addition to the District Court's findings, the record below also contains evidence of the maintenance of a dual school system in Dayton, both before and after Brown, in violation of Ohio law, see the discussion in Brinkman v. Gilligan, 503 F.2d 684, 688-690 (6th Cir. 1974), and of the school board's segregative practices with respect to staff assignment, site selection and school construction. Id. at 697-703. Although the Sixth Circuit noted that the plaintiffs had "raised serious questions with respect to whether the District Judge's failure to include these four school practices within the constitutional violation was supported by substantial

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1/ Although the District Court and the Sixth Circuit, when the case was first before it, did not use the phrase, "de jure," the Sixth Circuit specifically noted subsequently that the finding of the District Court was that, "the Dayton school system has been and is guilty of de jure segregation practices." Brinkman v. Gilligan, 518 F.2d 853, 854 (6th Cir. 1975). The District Court also found that the school board was guilty of de jure segregation when it rescinded prior resolutions that were designed to eliminate segregation, but the Sixth Circuit found it unnecessary to consider this point. Brinkman v. Gilligan, 503 F.2d 684, 697 (6th Cir. 1974).

evidence," it quite correctly concluded that it was unnecessary for it to pass on that question, Id. at 703, since it found that the District Court's conclusion - based on the discriminatory use of the optional attendance zones and the large number of racially identifiable schools - that the board was guilty of practicing de jure segregation was "amply supported by the evidence." Id. at 693.

The holding of the Sixth Circuit that the plaintiffs had made out a case of de jure segregation, entitling them to system-wide relief, was mandated by this Court's decision in Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189 (1973). In Keyes this Court held that in a school district where segregation had not been required by state law, the existence of de jure segregation could be established only by a showing of intent to segregate: "We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation...is purpose or intent to segregate." Id. at 208 (emphasis in original). See also the discussion in Washington v. Davis, 426 U.S. 229, 240 (1976). In Keyes it was also argued, as it is in the present case, that the plaintiffs had to show the existence of system-wide intent to segregate in order to be entitled to system-wide relief. This Court specifically rejected that contention, noting that, "We have never suggested that plaintiffs in school desegregation cases must bear the burden

of proving the elements of de jure segregation as to each and every school or each and every student within the school system." Id. at 200. What the plaintiffs are required to prove in a case challenging school segregation, as in any other case challenging racial discrimination, see Washington v. Davis, supra, Village of Arlington Heights v. Metropolitan Development Corp., ___ U.S. ___, 45 U.S.L.W. 4073 (Jan. 11, 1977), Casteneda v. Partida, ___ U.S. ___, 45 U.S.L.W. 4302 (March 23, 1977), is simply the existence of intent to discriminate.

The substantive constitutional right of black children is the right not to be compelled by state action to attend a segregated school system. See the discussion in Keyes, supra, at 225 (opinion of Powell, J.). Since this is so, where a school system is found guilty of practicing de jure segregation, whether in conformity to the requirements of state law or by a showing of intent to segregate, the school system must be desegregated by a plan that achieves the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Davis v. School Commissioners of Mobile County, 402 U.S. 33, 37 (1971).

In school districts where segregation was formerly required by law, and where "vestiges of state-imposed segregation" remain, system-wide relief is required, and no effort is made to "sort out" the

segregation that can be directly traced to state laws requiring segregated schools and that which might be traced to other causes. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

A system-wide remedy may also be imposed upon school districts which have become segregated not by state law but by intentionally discriminatory practices. Under Keyes, proof of "intentionally segregative school board actions in a meaningful portion of the school system creates a presumption that other segregated schooling within the system is not adventitious." 413 U.S. at 208. The school board can overcome this "presumption" by "proving that the other segregated schools within the system are not also the result of intentionally segregative actions." Id. Only when this presumption is rebutted, however, may the desegregation decree be limited to those schools shown to have been intentionally segregated.

In the present case, once the finding of intent to segregate was made, the burden shifted to Dayton to show how many of the 47 racially identifiable schools did not have that character as a "result of intentionally segregative actions." Id. Dayton, however, made no effort whatsoever to satisfy its burden. Although the District Court specifically delayed its supplemental order on remedy, pending this Court's decision in Keyes, the school board never moved the District Court to allow it to introduce

proof showing that the schools other than those that were segregated as a result of its discriminatory use of optional zones were not also "the result of intentionally segregative actions." Id. Quite probably, the school board did not do so because it knew that it could not show that "segregative intent was not among the factors that motivated its actions." Id. at 210. Instead of attempting to discharge the burden clearly placed upon it by Keyes, the school board has insisted throughout this litigation that the plaintiffs had the burden of establishing not only segregatory intent generally, but also segregatory intent with respect to the drawing of attendance zones, site selection, school construction and the like, that produced a condition of segregation in specific schools on a system-wide basis, in order to be entitled to system-wide relief.

As it turns out, the District Court correctly forecast this Court's decision in Keyes, and specifically referred to Keyes in ordering what it considered to be adequate system-wide relief. It must be emphasized that the District Court found not only intent to segregate with respect to the use of optional attendance zones - "intentionally segregative school board actions in a meaningful portion of the school system"[2/] (Id. at 208) - but

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2/ At the time of the litigation, there were seven optional elementary zones and four

(footnote continued on the next page)

also found a high degree of racial isolation and a large number of racially identifiable schools. 503 F.2d at 693-695. Under Keyes, the burden shifted to the school board to show that the racially identifiable character of these schools was not also "the result of intentionally segregative actions," 413 U.S. at 208, but the school board did not even try to sustain that burden. When the case came before the Sixth Circuit, the only question that it had to decide was whether the District Court's findings relating to segregative intent were "clearly erroneous," and it held that they were not. 503 F.2d at 693. Although the plaintiffs buttressed the District Court's findings of segregatory intent by showing the continuing effects of the prior maintenance of a dual system and by showing segregative staff assignment, site selection and school construction, these matters were unnecessary in light of Keyes, and the Sixth Circuit quite properly refused to consider this question. Id. at 703. Since the District Court found segregatory intent in the use of optional attendance zones, it was compelled to reach the conclusion, as it did, that the Dayton

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optional high school zones, in a system that had only 68 total schools and 11 high schools. The high school optional zones contributed most significantly to increased racial segregation. 503 F.2d at 694-696.

school board was guilty of practicing de jure segregation. Since the school board did not attempt to show that the racially identifiable character of its 47 one-race schools was not the result of "intentionally segregative actions," 413 U.S. at 208, there could be no question but that system-wide relief was mandated, as the Sixth Circuit ordered. And since the school board did not seek certiorari to this Court from the Sixth Circuit's decision, the finding of system-wide de jure segregation is now the "law of the case."

The school board is now, in effect, asking this Court to overrule Keyes and to hold that in a school district where segregation is not required by state law,3/ the intent to segregate test of de jure segregation no longer applies, and that black children do not have a constitutional right to attend school in a system that is not segregated. That position must be rejected. The Keyes principles relating to the burden of proof as to system-wide intent to segregate are as sound today as when this Court described them a scant four years ago. As this Court stated in

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3/ This is giving Dayton the benefit of the doubt, since it was operating a dual system, in violation of Ohio law, both before and after Brown. See the discussion, 503 F.2d at 688-690.

Keyes:

> "Where school authorities have been found to have practiced purposeful segregation in part of a school system, they may be expected to oppose system-wide desegregation, as did the respondents in this case, on the ground that their purposefully segregative actions were isolated and individual events, thus leaving the plaintiffs with the burden of proving otherwise. But at that point where an intentionally segregative policy is practiced in a meaningful or significant segment of a school system, as in this case, the school authorities cannot be heard to argue that plaintiffs have proved only 'isolated and individual' unlawfully segregated actions. In that circumstance, it is both fair and reasonable to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent."
> 413 U.S. at 209.

The District Court and the Sixth Circuit correctly applied the standards of proof for system-wide de jure segregation established by this Court in Keyes, and if Keyes is fully to be honored and enforced, their decision should be affirmed.

II

THE DESEGREGATION PLAN ADOPTED BY THE DISTRICT COURT AND APPROVED BY THE SIXTH CIRCUIT IS FULLY CONSISTENT WITH, AND IN THE CIRCUMSTANCES OF THIS CASE MANDATED BY, THE APPLICABLE DECISIONS OF THIS COURT.

The essential objection of the Dayton school board to the desegregation plan adopted by the District Court, approved by the Sixth Circuit, and implemented peaceably this past fall, is that it achieves "too much" desegregation by not allowing the board to continue to operate any of its previously 47 one-race schools as one-race schools. The school board confuses - seemingly deliberately - "racial balance" with the elimination of one-race schools so as to achieve the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Davis v. School Commissioners of Mobile County, 402 U.S. 33, 37 (1971). "Racial balance," as this Court stated in Swann, means that "every school must always reflect the racial composition of the school system as a whole." 402 U.S. at 24. If the desegregation plan for Dayton had required "racial balance," this would mean that every school would be required to be 52% white and 48% black, which clearly is not so.

Rather, the desegregation plan adopted for Dayton follows Davis by

attempting to achieve the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation," 402 U.S. at 37, and follows the directive of this Court in Swann mandating the elimination of one-race schools. 402 U.S. at 26. The plan employes a flexible minimum-maximum ratio of between 33% and 63% black, designed to insure that no school shall have so many blacks in relation to the system-wide black population so as to be perceived of as a racially identifiable black school or so few blacks so as to be perceived of as a racially identifiable white school.

The school board argues that the Sixth Circuit has "erroneously equated desegregation with the elimination of any predominantly white or predominantly black schools." (Pet. Cert., p. 16). But it is precisely the elimination of predominantly white and predominantly black schools that Swann mandates, and the essential objective of a desegregation plan must be to establish a school system in which there are no "black schools" or "white schools," but just schools, attended by children of both races. Green v. County School Board of New Kent County, 391 U.S. 430, 432 (1968). Moreover, as the Sixth Circuit emphasized, there are no practical obstacles to the elimination of all one-race schools in Dayton by the use of cross-busing (App. Pet. Cert., p. 121a), and this being so, "the greatest possible degree of actual desegregation, taking

into account the practicalities of the situation," 402 U.S. at 37, requires that the one-race schools be eliminated. Dayton simply has no right to retain any one-race schools, and the District Court, like all of the other courts that have adopted plans involving the use of flexible minimum-maximum racial ratios, see e.g., Keyes v. School District No. 1, Denver, 521 F.2d 465 (10th Cir. 1975), cert. denied, 423 U.S. 1066 (1976), was acting not only within its discretion, but in compliance with the desegregation standards contained in the applicable decisions of this Court.

Finally, Dayton argues that "forced transportation" will produce "white flight" and ultimately lead to "resegregation of the school system." (Brief for Petitioners, pp. 35-37). One would have thought that the "white flight" argument would have been laid to rest by this Court's reminder that the fear of "white flight" cannot be accepted as a reason "for achieving anything less than the complete uprooting of the dual school system," United States v. Scotland Neck Board of Education, 407 U.S. 484, 491 (1972); see also, Cooper v. Aaron, 358 U.S. 1, 16 (1958). The duty of the school board is to achieve a unitary system now, and if "white flight" results subsequently, and alters the racial composition of the schools under the desegregation plan, this is something over which the school board and the courts have no control. Pasadena

City Board of Education v. Spangler, 427 U.S. 424 (1976). So long as there are black children and white children living in Dayton, they are entitled to attend school in a desegregated school system. A present condition of segregation cannot be tolerated on the ground that it is necessary to prevent segregation in the future. It is the present condition of segregation that offends the Constitution, and it is that condition that must be eliminated.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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